STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2003
v	No. 237204 Oakland Circuit Court
JOHNNY LEE CANNON, Defendant-Appellant.	LC No. 00-171790-FH

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

The trial court found defendant guilty of violating probation, revoked defendant's probation, and sentenced him as an habitual offender to a prison term of fourteen months to five years, with credit for 171 days, concurrent to a five month term, with credit for 171 days. Defendant appeals his conviction and sentence as of right, and we affirm.

On May 5, 2000 in Oakland Circuit Court, defendant pleaded guilty of operating a vehicle while under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625, driving while license suspended (DWLS), second or subsequent offense, MCL 257.904, and habitual offender, fourth, MCL 769.12. Defendant was sentenced to two years' probation, the first year in Oakland County Jail. The judgment of sentence provided that the last six months of the sentence would be suspended if defendant entered a PA 511 residential treatment program.

In August 2000, the Oakland County Sheriff released defendant from the Oakland County Jail, and he was transferred to Wayne County for a probation violation of an OUIL, 3d conviction. Defendant was sentenced in Wayne County for that probation violation to one to five years' imprisonment. On September 15, 2000, the Wayne County Sheriff transferred defendant to the Michigan Department of Corrections (DOC) to serve that sentence. Defendant was paroled in mid-February, 2001.

On May 4, 2001, defendant's probation agent in the instant (Oakland County) matter, Stephen Crumb, issued a petition and bench warrant alleging that defendant had violated his probation in six ways, including: "1. Failed to contact the Oakland County Probation Department within two days from release from incarceration," and "4. Failure to report as instructed." After a probation violation hearing on August 8, 2001, the trial court found defendant guilty of both of those counts, declining to find defendant guilty of the other counts, which are not at issue here. This appeal ensued.

I

The prosecution has the burden of proving a violation by a preponderance of the evidence. MCR 6.445(E)(1). Probation violation proceedings involve a two-step process: 1) a factual determination that a defendant in fact is guilty of violating probation, and 2) a discretionary determination whether the violation warrants revocation. *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998). The trial court's factual findings are reviewed for clear error, *People v Thenghkam*, 240 Mich App 29, 43-47; 610 NW2d 571 (2000), and its decision to revoke probation is reviewed for an abuse of discretion. *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991).

II

Defendant asserts that the prosecution did not show by a preponderance of the evidence that he failed to report to his probation agent. Relatedly, defendant argues that the trial court erred and he was deprived of due process when the court found him guilty of failing to report to his probation agent within two days of his release from incarceration, because that condition was not specified in his probation order, was not ordered at sentencing, and was an ambiguous delegation of authority to the probation agent.

The Order of Probation entered by the trial court on July 11, 2000, required defendant to report to his probation officer on at least a monthly basis,[1] but did not include the two-day reporting requirement. The probation agent testified at the probation revocation hearing that he met with defendant on July 6, 2000, to orient him regarding the order of probation, and at that time gave defendant a verbal order to report to him within two days of being released from incarceration. Without regard to whether defendant had proper notice of the two-day requirement, it is undisputed that defendant failed to report to his probation agent between May 2001, when the probation agent ordered him to do so, and when he was arrested in July 2001.[2]

[1] The Order of Probation provided in pertinent part:

> 3. Make a truthful report to the probation officer monthly, or as often as the probation officer may require, either in person or in writing, as required by the probation officer.

[2] Defendant testified at the probation revocation hearing that his Wayne County attorney advised him that he was no longer on probation for this case because he had been sent to prison. The record is clear that defendant reported to his parole agent from the time he was paroled in February 2001 to June 2001. However, he did not contact his probation agent until May 2001, when he called and left a message for probation agent Crumb on May 1, 2001, on the advice of his parole officer. Probation agent Crumb testified at the hearing that he contacted defendant's parole officer in May 2001 in order to have defendant report to him (Crumb), and that after Crumb spoke with the parole officer, defendant called him (Crumb) on May 2, 2001, and left a voicemail message, and that defendant called Crumb again on May 3, 2001. Crumb testified that defendant's parole officer, Agent Woods, told defendant on May 2, 2001 to report to Crumb at 10:00 a.m. on May 3, 2001, for placement in the PA 511 residential treatment program. Crumb testified that Defendant called Crumb at 9:55 a.m. on May 3, 2001, "stating that he felt that he should not have to go into his Court Ordered PA 511 Residential Treatment Program, and that he was going to contact an attorney." Crumb called defendant at 10:30 a.m., and defendant told him

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The trial court did not err in violating defendant on the basis of his failure to report as instructed in the Order of Probation.

III

Defendant asserts that his sentence must be set aside as violative of due process because the trial court sentenced him to prison without an updated presentence report, and instead relied only on a narrative in the probation agent's petition and bench warrant, which was prepared more than three months before sentencing and was inaccurate.

The record is clear that the court did in fact sentence defendant without an updated presentence report, contrary to MCR 6.445(G).[3] However, this issue is moot as defendant has served his minimum sentence[4] and apparently was paroled on May 14, 2002.[5]

IV

Defendant asserts that the trial court's allowance of 171 days credit for time served was erroneous because the court should have credited him with the entire one-year jail sentence he received in his original sentence, regardless of whether he served less time because of any early release credits by the Oakland County Sheriff, plus the time he spent incarcerated in the DOC before he was sentenced for violating probation. Defendant notes that because an updated presentence report was never prepared, it is not possible to determine how the trial court arrived at the figure of 171 days credit. Defendant argues that the court's failure to apply the full one year sentence or the time defendant spent in the DOC, denied him his right against multiple punishments for the same offense under the double jeopardy clauses of the federal and state constitutions.

We agree with defendant that, on this record, it is impossible to determine how the trial court computed the days' credit. However, defendant does not claim that he did not receive credits for all time actually served on this offense plus good time earned, and the prosecution correctly observes that the trial court had the discretion to impose the sentence in this case

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he would report at 11:00 a.m., but did not.

[3] MCR 6.445(G) provides:

> If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report and having complied with the provisions set forth in MCR 6.425(B), (D)(2), and (D)(3).

[4] Defendant served his minimum sentence of fourteen months as of April 27, 2002.

[5] The DOC website, www.state.mi.us/mdoc/asp/otis2.html, states defendant was paroled on May 14, 2002.

consecutive to any sentence imposed in the Wayne County case under MCL 768.7b(2)(a). We thus find no error.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra